

IN THE UNITED STATES DISTRICT COURT FOR THE  
WESTERN DISTRICT OF OKLAHOMA

THOMAS SIZEMORE, )  
                          )  
Plaintiff,            )  
                          )  
                          )       CIV-15-381-M  
                          )  
v.                     )  
                          )  
W. A. SHERROD, et al., )  
                          )  
Defendants.           )

REPORT AND RECOMMENDATION

On April 9, 2015, Plaintiff, a state prisoner appearing *pro se*, filed this action pursuant to 42 U.S.C. § 1983. United States District Judge Miles-LaGrange subsequently referred the action to the undersigned Magistrate Judge for initial proceedings consistent with 28 U.S.C. § 636(b)(1)(B). For the following reasons, it is recommended that the cause of action be dismissed without prejudice.

With his Complaint, Plaintiff filed an Application To Proceed in District Court Without Prepayment of Fees or Costs. After reviewing the application, the undersigned entered an Order on April 13, 2015, granting Plaintiff leave to proceed *in forma pauperis* without full prepayment of the filing fee and directing Plaintiff to pay an initial partial filing fee of \$4.85. This amount represents 20 percent of the average monthly deposits in Plaintiff's prison accounts for the six-month period immediately preceding the filing of the Complaint as set out in the certified statement of institutional accounts submitted by Plaintiff.

See 28 U.S.C. § 1915(b).

Plaintiff was directed to pay the required fee on or before May 1, 2015, and advised that unless he either paid the required partial filing fee by the specified date or showed cause in writing for his failure to comply, the action could be dismissed without prejudice to refiling. Plaintiff was further advised of the opportunity to voluntarily dismiss the action under Fed.R.Civ.P. 41(a) on or before May 1, 2015, without incurring any fees or costs.

To this date, Plaintiff has neither paid the required initial partial filing fee, requested an extension of time to do so, or submitted an explanation for not complying with the Order. Plaintiff's failure to pay the required initial partial filing fee and the expiration of the time given Plaintiff to make such payment warrant dismissal of the action without prejudice to refiling. LCvR 3.4(a). Freeman v. Colo. Dep't of Corr., 396 Fed. App'x. 543 (10<sup>th</sup> Cir. 2010)(unpublished op.)(affirming dismissal without prejudice of § 1983 action for failure to pay required initial partial filing fee); Barnett v. Ray, 320 Fed. App'x. 823 (10<sup>th</sup> Cir. 2009)(unpublished op.)(same).

Furthermore, Plaintiff's lack of interest in complying with the Court's Order combined with the Court's attempt to manage and control its caseload warrant a dismissal of the cause of action without prejudice. See Gripe v. City of Enid, 312 F.3d 1184, 1188 (10<sup>th</sup> Cir. 2002)(“The Federal Rules of Civil Procedure authorize sanctions, including dismissal . . . for failing to comply with court rules or any order of the court, *see* Fed.R.Civ.P. 41(b)”). See also Nasious v. Two Unknown B.I.C.E. Agents at Arapahoe County Justice Ctr., 492 F.3d 1158, 1161 n. 2, 1162 (10<sup>th</sup> Cir. 2007)(*sua sponte* dismissal for failure to comply with

court's orders permitted under federal rules, and court need not follow any particular procedures in dismissing action without prejudice for failure to comply).

**RECOMMENDATION**

Based on the foregoing findings, it is recommended that Plaintiff's cause of action be DISMISSED WITHOUT PREJUDICE for failure to pay the required filing fee and failure to comply with the Court's Orders. Plaintiff is advised of the right to file an objection to this Report and Recommendation with the Clerk of this Court by \_\_\_\_\_ June 3<sup>rd</sup>, 2015, in accordance with 28 U.S.C. § 636 and Fed. R. Civ. P. 72. The failure to timely object to this Report and Recommendation would waive appellate review of the recommended ruling. Moore v. United States, 950 F.2d 656 (10<sup>th</sup> Cir. 1991); cf. Marshall v. Chater, 75 F.3d 1421, 1426 (10<sup>th</sup> Cir. 1996)(“Issues raised for the first time in objections to the magistrate judge's recommendation are deemed waived.”).

This Report and Recommendation disposes of all issues referred to the undersigned Magistrate Judge in the captioned matter, and any pending motion not specifically addressed herein is denied.

ENTERED this 14<sup>th</sup> day of May, 2015.



GARY M. PURCELL  
UNITED STATES MAGISTRATE JUDGE